BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

VICTOR GAROUTTE Claimant	)	
VS.	)	
OSMOSE UTILITIES SERVICE Respondent	)	Docket No. **1,033,041**
AND	)	
ARCH INSURANCE CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the April 25, 2012, Award entered by Administrative Law Judge Thomas Klein. The Board heard oral argument on August 7, 2012. William L. Phalen, of Pittsburg, Kansas, appeared for claimant. Randall E. Fisher, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

Judge Klein found claimant gave timely notice and timely written claim of his alleged series of accidental injuries. Judge Klein, however, found claimant did not meet his burden of proving he suffered a permanent impairment as a result of his work-related activity. Accordingly, workers compensation benefits were denied.

The Board has considered the record and adopted the stipulations listed in the Award with the following corrections: the deposition of Victor Garoutte was taken November 17, 2009 (not November 21, 2007); the hearing held January 9, 2008, was a preliminary hearing (not a regular hearing); and the regular hearing was held September 29, 2009 (not November 17, 2009). Further, the Board has considered the independent medical examination report of Dr. Pat Do dated July 31, 2007.

ISSUES

Claimant argues Judge Klein erred in finding that claimant failed to meet his burden to prove he suffered permanent impairment to his spine and his bilateral upper extremities as a result of a series of work-related accidental injuries. Claimant first argues Judge Klein erred in considering the report of Dr. Pat Do, the court-ordered physician, as Dr. Do saw claimant only to determine the need for treatment related to the work injury. Claimant

contends Dr. Do did not see claimant for rating purposes and gave no opinion regarding any permanent impairment. In the event the Board finds the report of Dr. Do should be considered, claimant contends the opinions of Dr. Edward Prostic are more credible than those of Dr. Do. The claimant argues the Board should, therefore, find claimant had a 20 percent permanent partial impairment to his whole body for his spine and a 10 percent permanent partial impairment to each upper extremity for carpal tunnel syndrome, which combine to a 30 percent impairment to the whole body. In either event, claimant asserts Dr. Do did not address claimant's complaints of carpal tunnel syndrome and Dr. Prostic's opinion concerning permanent partial impairment to claimant's right upper extremities is uncontradicted. Further, claimant argues he is eligible for a work disability based on a 100 percent wage loss and a 71 percent task loss.

Respondent did not provide a submission letter to Judge Klein and did not file a brief in this appeal.

At oral argument, the parties agreed that timely notice and written claim were not issues for the Board's consideration. The issues for the Board's review are:

(1) Did Judge Klein err by considering the report of the court-ordered independent medical examination (IME) physician?

(2) Did claimant prove he suffered permanent impairment to his spine and/or his bilateral upper extremities as a result of his work-related activity? If so, what is the nature and extent of claimant's functional disability?

(3) Is claimant entitled to payment of temporary total disability benefits from May 16, 2006 through July 31, 2007?

(4) Is claimant entitled to payment of outstanding medical bills and future medical treatment?

FINDINGS OF FACT

Claimant contends he was injured while working at respondent in a series of accidents beginning on or about March 2, 2006. He was employed by respondent as a laborer, and his job was reinforcing telephone poles with steel C-trusses. Among other duties, his job entailed helping lift the steel C-trusses, which weighed from 160 to 260 pounds apiece; setting up a jackhammer, which weighed approximately 200 pounds; and occasionally operating a jackhammer.

Claimant had been working for respondent a few months when, on or about March 2, 2006, he injured his back while helping his foreman, David Austin, lift a steel C-truss. Claimant testified he felt immediate pain in his lower back and dropped to his knees. Eventually the pain started going down his left leg. Claimant said he immediately reported his injury to Mr. Austin, who was present and witnessed the accident. He said Mr. Austin

then called his supervisor. Claimant could not hear the entire conversation, but he heard Mr. Austin describe the accident to his supervisor and tell his supervisor that claimant wanted to see a doctor. Claimant went to his motel and rested for an hour before returning to work and finishing his shift.

Claimant said the next day he asked Mr. Austin if he could be seen by a doctor and was told respondent did not have medical insurance on any of the laborers. Claimant said he complained, on a daily basis, about the injury to his back to his foreman. Claimant further testified that he started to develop numbness in his upper extremities when gripping the steel while lifting. He also complained of left leg symptoms. Although in his deposition, on direct examination, claimant said he never told Mr. Austin that his work was hurting his arms or shoulders, on redirect examination, claimant said he complained to his foreman about the work hurting his hands about every day. Claimant said he could not handle lifting the C-trusses and operating the jackhammer, so he left employment with respondent on May 16, 2006.

Billing records show claimant was treated at Coffeyville Regional Medical Center on June 16, 2006, for an abscess. Claimant sought additional treatment at Coffeyville Regional Medical Center on August 15, 2006. He testified that he complained of back pain, was given two shots in each hip and was told to see his family physician, Dr. T. M. Venkat. Billing records for this date of service concern lab work, a CT scan of the pelvis and abdomen and administration of pain medication. Claimant also went to Mercy Hospital in Independence, Kansas, on October 8, 2006. He said he was again given two shots in each hip and told to go back to his family physician. The Mercy Hospital billing record concerns a low back sprain, but states claimant's condition was not related to current or previous employment or an accident.

Claimant also testified that his primary care physician, Dr. Venkat, referred him to a chiropractor, Dr. Terry Thompson. Claimant said Dr. Venkat, wanted him to obtain an MRI, but claimant could not afford to have one done.

Dr. Edward Prostic, a board certified orthopedic surgeon, examined claimant on March 5, 2007, at the request of claimant's attorney. Claimant told Dr. Prostic his problems began when he lifted a heavy piece of steel and felt pain in his mid back. Claimant denied previous difficulties with his back or any other area of preexisting musculoskeletal impairment.

Claimant's complaints were pain in the center of his mid back below the shoulder blades and episodic numbness and tingling of both hands. Claimant takes over-the-counter Ibuprofen for pain. Dr. Prostic said claimant's complaints of pain were consistent with the mechanism of injury given to Dr. Prostic as having occurred with respondent; the results of his physical examination were consistent with the complaints of pain reported to him by claimant; and the results of the physical examination were consistent with the mechanism of injury given to him by claimant as having occurred at respondent each and every working day beginning on or about March 2, 2006, and continuing thereafter.

Dr. Prostic took x-rays of claimant's lumbar spine, which showed disc space narrowing at L5-S1 and significant disc space and vertebral body erosion at L1-2 consistent with acute diskitis. Dr. Prostic believed that claimant should have an MRI to further the evaluation. Dr. Prostic said when he saw claimant in March 2007, he had acute diskitis, an infectious process that can be caused by many things, not just someone lifting something. Claimant said at his examination in March 2007, claimant had significant abnormalities on his x-rays and an abnormal physical examination. Dr. Prostic stated that claimant had a history of a traumatic incident at work with back pain followed by seeking help of a chiropractor. Dr. Prostic made no treatment recommendations for carpal tunnel syndrome at or immediately following the March 2007 evaluation.

Dr. Prostic said claimant had degenerative arthritis at L5-S1, which was away from the area in which he diagnosed acute diskitis, which was at L1-2. In reviewing the x-rays from March 5, 2007, Dr. Prostic said there was an abnormal appearance at L1-2 with asymmetric disc space narrowing, which could be caused by degenerative changes. On the oblique x-rays, there was significant posterior facet arthritis at L1-2. On the lateral view, there was significant loss of disc height anteriorly at both L1 and L2 with severe changes of the end plates and a markedly abnormal appearance of the disc space. Dr. Prostic said the posterior facet arthritis could be related to repetitious trauma. The difference in appearance of L1 and L2 bone and the disks between them is typical of an infectious process.

Dr. Pat Do, a board certified orthopedic surgeon, examined claimant on July 31, 2007, at Judge Klein's referral. Claimant reported an injury to his back in March 2006 when lifting C-trusses. Dr. Do noted claimant was a poor historian and his version of events conflicted with information contained in the medical records. Claimant said he had been injured at work and had been treated by a workers compensation doctor, but there were no records that he had been seen under workers compensation.

Claimant complained to Dr. Do of a constant, sharp, stabbing pain primarily located in the middle of his back. Claimant said his pain was a 10 on a 0-10 pain scale. At the examination, claimant did not appear to be in any distress or discomfort, but ambulated with an antalgic gait. He was able to change positions from a chair to a table with no difficulty. Dr. Do diagnosed claimant with back pain due to disc space narrowing at L1-2 and L5-S1.

Dr. Do opined: "It [sic] my medical opinion that within a reasonable degree of medical probability the [claimant's] current complaints are due to the degenerative changes mentioned above in the spine."[1] Dr. Do did not believe that claimant was in need of any further treatment due to any type of work-related injury. Dr. Do did not examine or offer any opinion concerning claimant's bilateral upper extremities.

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[1] July 31, 2007 IME report of Dr. Pat Do at 4.

On September 9, 2008, Dr. Prostic wrote claimant's attorney a letter in which he rated claimant as having a 10 percent permanent partial impairment of the body as a whole for the lumbar spine and a 10 percent impairment to each upper extremity for carpal tunnel syndrome. Dr. Prostic also recommended claimant avoid returning to work that required lifting weights greater than 30 pounds occasionally or 10 pounds frequently and also that claimant avoid frequent bending or twisting at the waist, forceful pushing or pulling, more than minimal use of vibrating equipment, or captive positioning.

Dr. Prostic examined claimant a second time, again at the request of claimant's attorney, on December 2, 2009. Claimant had no substantial additional treatment since his last examination. He continued to be out of work and was on Social Security disability, reportedly for a combination of his musculoskeletal difficulties, hepatitis, and lack of education. Claimant told Dr. Prostic his greatest complaints were pain in the center of his low back above the waist with radiation to both anterior thighs to just below the knees with numbness and tingling. He also had recurrent pain, numbness and tingling to the radial side of each hand. He was still taking over-the-counter Ibuprofen. Dr. Prostic said claimant's complaints were consistent with the mechanism of injury beginning March 2, 2006, and each and every working day at respondent thereafter.

Dr. Prostic again took x-rays of claimant's lumbar spine, which revealed spontaneous arthrodesis anteriorly at L1-2 and significant degeneration at T11-12. Dr. Prostic opined that claimant had an injury at work to the L1-2 disc which may or may not have had preexisting disease. He further opined that following this injury, infection settled in which led to a spontaneous fusion of those two vertebral bodies.

Dr. Prostic diagnosed claimant with bilateral carpal tunnel syndrome and acute diskitis of L1-2 with significant residual symptoms. He believed that claimant sustained injuries to his low back and hands from the work-related activities he performed beginning March 2, 2006, and thereafter. Dr. Prostic said claimant's carpal tunnel syndrome was not related to claimant's lifting the heavy piece of steel in March 2006. Dr. Prostic related claimant's bilateral carpal tunnel syndrome to his work at respondent because claimant said he did repetitious gripping and lifting. Dr. Prostic understood that claimant alleged injury from March 2 through May 16, 2006. Dr. Prostic believed claimant's carpal tunnel was aggravated by his employment at respondent.

Using the AMA *Guides*[2], Dr. Prostic rated claimant has having a 20 percent permanent partial impairment to the body as a whole for his spine and a 10 percent permanent partial impairment to each upper extremity for carpal tunnel syndrome, which combines for a 30 percent functional impairment to the body as a whole.

[2] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

Dr. Prostic continued the restrictions he had previously placed on claimant in his letter of September 9, 2008. He added that claimant should also avoid frequent gripping. Dr. Prostic reviewed the task loss list prepared by Karen Terrill. Of the 21 unduplicated tasks on the list, he believed claimant was unable to perform 15 for a 71 percent task loss. Dr. Prostic opined that claimant is permanently and totally disabled from substantial gainful employment as a result of his work injury at respondent beginning March 2, 2006, and continuing thereafter.

Karen Terrill, a rehabilitation consultant, interviewed claimant by telephone on October 5, 2009. Together they compiled a list of 21 unduplicated tasks performed in claimant's work for the period of 15 years before his injury. Ms. Terrill asked claimant if he had returned to work since his injury, and claimant indicated he had not. Ms. Terrill said in preparing for her interview with claimant, the sole source of information she used in determining claimant's permanent physical restrictions were the permanent restrictions placed on him by Dr. Prostic. Ms. Terrill did not review Dr. Do's report.

Ms. Terrill found that claimant had completed the fifth grade and has not been in school since 1973. He has never been in junior high or high school, and he does not have a GED. He has never been to college or acquired any additional special skills. This would be a limiting factor in terms of the number of jobs that would be available to claimant in the open labor market. Claimant further has no transferable job skills. He was 49-years old at the time of the interview, meaning he was approaching the age of 50, considered an older worker by the Social Security Administration. Ms. Terrill believed that considering the totality of claimant's case, he would be unable to engage in any type of substantial, gainful employment and was permanently and totally disabled from substantial, gainful employment.

The only medical records in evidence are reports and letters from Dr. Prostic and Dr. Do. The record contains no treatment records from Coffeyville Regional Medical Center, Mercy Hospital, Drs. Thompson or Venkat.

PRINCIPLES OF LAW

K.S.A. 2005 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2005 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510e(a) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not

covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 44-510d(a) states:

Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . .

(12) For the loss of a forearm, 200 weeks.

(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

. . .

(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth

edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

K.S.A. 44-516 states:

> In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct. The report of any such health care provider shall be considered by the administrative law judge in making the final determination.

ANALYSIS

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[3] "Uncontroverted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive."[4] As the Kansas Court of Appeals noted in *De La Luz Guzman-Lepe*[5], appellate courts are ill suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the factfinder. "One of the reasons that appellate courts do not assess witness credibility from the cold record is that the ability to observe the declarant is an important factor in determining whether he or she is being truthful."[6] While the Board conducts de novo review, the Board often gives some deference to a judge's findings and conclusions concerning credibility where the judge was able to observe the testimony in person. Here, Judge Klein had the opportunity to

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[3] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[4] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146, syl. ¶ 2 (1976); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036, syl. ¶ 5 (1978).

[5] *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

[6] *State v. Scaife,* 286 Kan. 614, 624, 186 P.3d 755 (2008).

personally observe the claimant's testimony at the preliminary hearing held January 9, 2008. While Judge Klein did not cite any particular reasons to doubt claimant, he held "claimant has not met his burden to show that he suffered any impairment as a result of his work related activity."[7]

Judge Klein had reason to not believe the claimant's allegations. Claimant was convicted of crimes involving dishonesty or false statement, including burglary, theft and grand theft auto.

Claimant's testimony and symptoms were also inconsistent. Claimant initially denied at his deposition that he advised respondent about arm complaints, but later testified that he did advise respondent about his arm complaints. Claimant reported no leg symptoms to Dr. Prostic on March 5, 2007. However, by December 2, 2009, claimant told Dr. Prostic that he had pain, numbness and tingling in both legs.

Judge Klein's ruling that claimant failed to prove any impairment appears to be based largely on Dr. Do's court-ordered opinion. Dr. Do noted claimant was a poor historian and information provided by claimant conflicted with what was contained in the medical records. Dr. Do opined claimant's complaints were due to the degenerative changes in the spine. Dr. Do did not believe that claimant needed any further medical treatment due to any sort of work-related injury.

Claimant asserts Judge Klein improperly considered Dr. Do's court-ordered report. Kansas law mandates that Judge Klein consider such report. Judge Klein did not err in considering Dr. Do's report: K.S.A. 44-516 states the neutral report "shall be considered by the administrative law judge in making the final determination."

Judge Klein also noted that Dr. Do's opinions were more credible than those of Dr. Prostic. Dr. Do, as a court-ordered and neutral evaluator, had no reason to be biased or to side with either party. Dr. Prostic, on the other hand, testified that he performed about 150 IMEs in a year for claimant's counsel alone.[8]

Claimant asserts that Dr. Do wholly failed to examine his upper extremities. This is likely true, but it is not known from the record if claimant even complained to Dr. Do about his upper extremities.

The record shows claimant filled out a questionnaire and pain inventories for Dr. Do. The claimant primarily complained to Dr. Do about back pain. Dr. Do had Dr. Prostic's March 5, 2007 report that mentioned bilateral hand numbness and tingling. The only medical evidence of bilateral upper extremity symptoms were reports and a letter from Dr.

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[7] ALJ Award (April 25, 2012) at 3.

[8] *Id.* at 21.

Prostic. The first mention of hand numbness and tingling is contained in Dr. Prostic's March 5, 2007 report. Dr. Prostic did not recommend any upper extremity treatment or tests at that time. The claimant did not even tell Dr. Prostic about upper extremity symptoms until asked by such doctor if he had other physical problems.[9] Claimant actually told Dr. Prostic that he was injured from lifting a heavy piece of steel, not from repetitively using his upper extremities.[10] Dr. Prostic attributed claimant's carpal tunnel syndrome to claimant's description of repetitious forceful activities involving his upper extremities.[11] There is no evidence that claimant told any medical professionals, apart from his attorney's hand-picked expert, that he had any sort of upper extremity symptoms. Dr. Prostic did not recommend any treatment for claimant's bilateral carpal tunnel syndrome until issuing his December 2, 2009 report, well over two and one-half years after his first evaluation.

Dr. Do's focus on claimant's back was appropriate. Claimant's application for hearing alleges a back injury. While there is all-inclusive language that claimant also alleged injury to "all other parts of the body affected," the arms, wrists and hands were not mentioned with particularity.

The Board affirms, in part, Judge Klein's Award. Claimant failed to prove permanent impairment as a result of his work for respondent.

Claimant asked Judge Klein to award temporary total disability benefits from May 16, 2006 until Dr. Do's July 31, 2007 evaluation. However, there is no proof that claimant had restrictions or was temporarily and totally disabled during such time frame.

The Board also modifies Judge Klein's Award. Claimant's testimony that his medical bills stem from his asserted work injury is generally not contradicted. Respondent is ordered to pay the medical bills marked as deposition exhibit 2 at the November 17, 2009 deposition transcript, up to what the Kansas Fee Schedule allows, with the exception of paying the Coffeyville Regional Medical Center bill dated June 16, 2006, which apparently concerns incision and drainage of an abscess.

The Board also awards the claimant future medical treatment upon proper application to the Director of Workers Compensation. However, the Board notes that it would be difficult for claimant to prove the need for additional medical treatment for an accident or series of accidents that resulted in no permanent injury.

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[9] *Id.* at 29.

[10] *Id.* at 21, Ex. 2 at 1.

[11] *Id.* at 21.

CONCLUSION

The Board affirms, in part, Judge Klein's Award. Claimant failed to prove permanent impairment as a result of his work for respondent. The Board finds claimant was not entitled to payment of temporary total disability benefits. Claimant is entitled to payment of medical bills identified as exhibit 2 to the November 17, 2009 deposition transcript, up to what the Kansas Fee Schedule allows, with the exception of the June 16, 2006 Coffeyville Regional Medical Center statement for unrelated treatment. Claimant is entitled to future medical treatment upon proper application to the Director of Workers Compensation.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated April 25, 2012, that claimant failed to prove permanent impairment as a result of his work is affirmed. The Award is modified to find claimant is not entitled to payment of temporary total disability benefits.

IT IS SO ORDERED.

Dated this _____ day of November, 2012.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

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Thomas Klein, Administrative Law Judge